United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

To be argued by
E. David Duncan

No. 75-1014

B

P/S

Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

against

JOHN J. LYNCH,

Appellant.

BRIEF AND APPENDIX FOR DEFENDANT-APPELLANT JOHN J. LYNCH

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UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 75-1014

UNITED STATES OF AMERICA,

Appellee,

against

JOHN J. LYNCH,

Appellant.

BRIEF FOR DEFENDANT-APPELLANT
JOHN J. LYNCH

Preliminary Statement

This Brief is submitted in support of defendant-appellant's appeal from a judgment of conviction and sentence of the defendant, John J. Lynch, entered on March 21st, 1975, in the office of the Clerk of Federal Court of the Northern District of New York.

Issues Presented

1. Should the motion for suppression of the property of the defendant seized by the police of the Town of Colonie have been granted, and the property seized from the defendant suppressed?

STATEMENT OF THE CASE

The defendant was convicted by a trial jury of two counts of a three count indictment arising out of an alleged bank theft that occurred at the Community State Bank, at Schenectady, New York, on June 7, 1974.

A motion for suppression of certain personal property seized by the Town of Colonie Police from the defendant was denied by the order and decision of Honorable James T. Foley after a lengthy hearing. A motion for the suppression of evidence adduced at a lineup at the Albany County Jail was likewise denied. At the trial, certain monies, and a rifle seized from the defendant on July 6, 1974, were admitted into evidence over objection. These items were a substantial part of the Government's case.

The suppression hearing held on the 16th day of October, 1974 disclosed the following:

The defendant, John J. Lynch, left a shaving kit either outside The Price Chopper on Route 7 in the Town of Colonie or inside the store at about 10:30 P.M. on July 6, 1974. Upon discovering the loss, he returned to The Price Chopper at about 11 o'clock P.M. The shaving kit, containing money, some 22 caliber bullets and sunglasses, had been turned over to the store night manager, Andre Quintos.

The store night manager testified that he took the money out of the shaving kit and laid it on a checkout counter. Apparently at this point the security guard, Murray, recommended that the Colonie Police be called. The defendant Lynch

satisfied the manager that the shaving kit and money were his. The manager stated that Lynch further verified all the money was there. The manager further testified, "I gave the money to him (Lynch)." (TR - 54). The manager testified that Lynch picked the money up and placed it in the shaving kit, with Lynch holding the shaving kit. The manager could not recall seeing Lynch walk away with the kit.

Apparently at this time the Colonie Police had arrived. Both Colonie Police Officers testified that after questioning Lynch he was asked to step outside and Officer Leonard scooped up the money and asked Lynch to step outside. Nowhere is there any testimony by anyone that custody of the shaving kit and money was given to the Police by the officials of the store. They simply seized it, if the Police Officers' version is to be believed. The security officer testified that he was concerned over the money, and, after following the Police outside, the officer in response to a request for a receipt said, "We are in charge now."

The defendant Lynch testified that after he picked the money up from the counter and put it in the shaving kit, he retained possession of it until Lt. Hahn of the Colonie Police pulled it from the front seat of Lynch's automobile. Lt. Hahn testified that he did indeed pull the shaving kit containing the money from the front seat of Lynch's automobile.

Therefore, in following the testimony of the store manager, the defendant Lynch, and Lt. Hahn, the shaving kit with the money therein was given to Lynch by the store manager, retained by Lynch, and ultimately removed from Lynch's car by Lt. Hahn.

In following the version of the two Colonie Police Officers who arrived at the scene, the money was picked up by Officer Leonard from the counter and retained by the Police. Even this version, which is contradicted by Lynch, the night manager and Lt. Hahn, fails to show at any point that the money was turned over to them by store officials or the defendant. It was seized.

In regard to the gun, it was testified by the first two Colonie Police Officers that after walking out of the store with Lynch, they observed his car steaming. The officers contend Lynch was asked if they could turn his car off. Lynch testified that after Lynch mentioned his car was steaming and he should go, Officer Leonard, without inquiry, walked over and turned it off.

Officer Leonard testified that as he turned the car off, he observed the stock of the gun wedged in the seat. He said he pulled it out and identified it as the stock of a gun. He then testified that he observed the end of the barrel of a gun sticking out from under a blanket in the back seat of Lynch's car.

Officer Leonard testified that he then asked Lynch if he could look at the gun. According to Officer Leonard, Lynch replied, "If you have to search it, go ahead."

Officer Leonard, after Lt. Hahn arrived, took Lynch into custody for having an "illegal" gun. Leonard signed the complaint which was admitted into evidence at the suppression hearing. A copy of said information is attached to the Appendix. (A - 16).

Officer Leonard measured the gun on the witness stand and stated it was 26½ inches long. The defendant was charged with Section 265.05 of the New York State Penal Law.

Finally, it should be noted that the defendant was not suspected of any crime and that the Police questioned him as to where he obtained the $1,211.00 found in his shaving kit. There was not a scintilla of evidence that the defendant had committed a crime at the time of the illegal seizures or, in fact, that a crime was committed.

There is further verification that there was no reasonable cause for seizing the money and the gun in that prior to the seizures a radio check of both the person of John J. Lynch and his vehicle disclosed to these same policemen that John J. Lynch was not wanted by the authorities and his vehicle was properly registered to him.

Review of the testimony of the suppression hearing discloses that when the defendant Lynch demanded his money and rifle, Lt. Hahn ordered him placed under arrest and stated he was taking custody of the property. (A - 17). This eliminates the issue of voluntariness to justify the seizure.

POINT I

THE U. S. GOVERNMENT'S CONTENTION ADOPTED BY THE TRIAL COURT THAT THE SEIZURES WERE LAWFUL BECAUSE THE POLICE HAD PROBABLE CAUSE IS INVALID.

The U. S. Government contended and the Trial Court adopted the theory that the seizures were justified because the police had probable cause to arrest even though the so-called "weapons charge" was involved.

In a later point of this Brief, the invalidity of the "weapons charge" will be demonstrated.

The position of the U. S. Government is that even if the "weapons charge" was invalid, the police could rely on probable cause to justify the seizure of the defendant's property.

First of all, it is submitted that it is not demanded of the police that they be constitutional lawyers who can ascertain the invalidity of statutes, but it is submitted that where a statute is misapplied factually against a citizen there is a want of probable cause.

There is no doubt that where a statute has been subsequently ruled by the Courts to be constitutionally invalid, the police have not lost their mantle of probable cause. Pierson v. Ray, 386 U.S. 547; U. S. v. Kilgen, 445 F. 2d 287, and U. S. v. Dameron, 460 F. 2d 294.

However, in our instant case there has been no challenge made by the defendant to the "weapons charge" on any constitutional basis or upon its invalidity in any manner but

simply that it did not apply to the facts as the police found them on the night in question.

If it is held by this Appellate Court that the police are not responsible for their own misapplication of statutes and making arrests, searches and seizures in consequence thereof, then the protection of the Fourth Amendment of the United States Constitution has been struck a fatal blow.

The Trial Court in its decision denying the motion to suppress cited Adams v. Williams, 407 U.S. 143; Terry v. Ohio, 392 U.S. 1, and Chambers v. Maroney, 399 U.S. 42.

The Williams case was cited for the principle that where a policeman lacks probable cause, he is not required to shrug his shoulders and allow a crime to occur or a criminal to escape. Review of the Williams case discloses that a police officer, acting on a tip from an informer that an individual in a car had narcotics and a gun strapped to his waist, went to the car, reached in and pulled the concealed weapon from him and searched the car after arresting him on a gun charge. The subsequent search disclosed narcotics and another weapon.

This is far different from our instant case, where the money and rifle were not contraband but were seized at the same time as the illegal arrest on the "weapons charge". In our instant case there was no indication a crime had been committed. In fact the police before the arrest had radio-checked the defendant and his license registration of his automobile, both of which inquiries proved negative.

As there were no facts brought to the mind of the police, it is inconceivable that the police were acting as prudent men and would come within the purview of the Williams case.

POINT II

"CONSENT" WAS NO FACTOR IN THE SEIZURE OF THE PROPERTY OF THE DEFENDANT.

The Trial Court in its decision held that the property seized by the police was a result of the voluntary consent of the defendant.

It should be pointed out that the Trial Court appears to draw no distinction between a search and a seizure. Even if the circumstances surrounding the defendant's initial contact with the police amounted to a consent to search his automobile, there is nothing in the record to disclose that the defendant consented to the seizure of his property at the time of his arrest. In fact the opposite is true. As the record discloses on page 109 of the transcript of the suppression hearing, Lt. Hahn seized his property at the time of the illegal arrest in spite of the defendant's pleas to have his property returned. (A - 17).

POINT II

THE ARREST OF THE DEFENDANT FOR A VIOLATION OF NEW YORK PENAL LAW SECTION 265.05 WAS VALID SINCE IT WAS BASED ON PROBABLE CAUSE.

The appellant places great reliance on the argument that the seizure of evidence from him was unreasonable since the arrest for the weapon violation was invalid. He contends that the validity of the arrest is dependent on the ultimate, proper disposition of the state charge, i.e. if the charge should be dismissed on legal grounds stemming from the length of the weapon then the arrest itself is contaminated. This notion is erroneous.

Only probable cause is required to validate the arrest. The ultimate outcome of the state case is immaterial. This is evidenced by the statute under which the police were operating in the present case:[2]. . .

POINT III

THE SEIZURE OF THE DEFENDANT'S GUN, MONEY AND OTHER PROPERTY WAS ILLEGAL AS THE ARREST WAS UNLAWFUL.

It is beyond dispute that the seizure of defendant's gun, money and other property at the time of his arrest was unlawful if the charge which was the basis for his arrest was not a crime. The United States Government's position as to the taking of the money under the Personal Property Law of the State of New York will be disposed of in a subsequent point.

Contemporaneously with the seizing of the gun and the money, the defendant was arrested and charged with violation of Section 265.05, subdivision 2, of the Penal Law of the State of New York. Obviously this was done to justify the search and seizure.

Section 265.05 (2) of the New York State Penal Law is set forth as follows:

> "2. Any person who has in his possession any firearm which is loaded with ammunition, or who has in his possession any firearm and, at the same time, has in his possession a quantity of ammunition which may be used to discharge such firearm is guilty of a class D felony. Such possession shall not, except as provided in subdivision three of this section, constitute a felony if such possession takes place in such person's home or place of business."

Though violation of this section is a felony, it was changed to a misdemeanor by the arresting officer upon the advice of Lt. Hahn with the explanation that this would allow

the defendant to go home (TR. - 90). This intriguing testimony demonstrates that the arrest was made to justify the seizure of defendant's property and the withholding of it from him.

More important, however, is that violation of Section 265.05(2) is determined by the definition of the word "firearm" as defined by Section 265.00 (3) of the New York State Penal Law, which is set forth as follows:

> "3. 'Firearm' means any pistol, revolver, sawed-off shotgun or other firearm of a size which may be concealed on the person."

The Courts of the State of New York have explicitly ruled on the size of a gun which may be concealed on the person and defined as a firearm. It should be noted again that Officer Leonard measured the gun seized, and without the detached portion of the stock it measured 26½ inches in length!

First of all, in regard to concealment of firearm statutes, Judge Sobel, in People v. Raso (9 Misc. 2d 739), in commenting on the predecessor statute of Sections 260.00 and 260.05 of the New York State Penal Law, stated at page 740:

> "The gist of the statute is possession, But possession is prohibited only with respect to small arms ' of a size that may be concealed on the person'. Obviously possession of rifles is not prohibited by this subdivision."

This principle has been followed under the new Penal Law in the case of People v. Palermo (36 A.D. 2d 565), where the Police found a shotgun in a trunk, where the end of the gun

had been altered. The barrel measured 18 inches, and the Appellate Division, after reciting the language of Judge Sobel, concluded that subdivision 3 of Section 265.00 of the New York State Penal Law was directed to a type of weapon which could be concealed upon the person and not to the particular shotgun in that case.

In the case of People v. Brian Caffrey (73 Misc. 2d 405), the Criminal Court of the City of New York held that where the overall length of a 22 gauge rifle was reduced to 16 inches, it was considered a "firearm" within the definition of the statute. The Court felt that such a rifle could be concealed on the person. The obvious distinction was its length.

In the case of People v. Roberts (73 Misc. 2d 500), the District Court of Suffolk County, in following People v. Palermo (36 A. D. 2d 565), held that a sawed-off shotgun whose barrel was 13½ inches and whose overall length was 23½ inches may not be concealed on the person and, therefore, was not a "firearm" within the meaning of subdivision 3 of Section 265.00 of the Penal Law.

Therefore, in our instant case, where the 22 gauge rifle was found to be 26 inches in overall length by the attesting officer, it is obvious that the arrest was not lawful, and all property seized at the time prior and subsequent to the illegal arrest must be suppressed.

POINT IV

THE GOVERNMENT'S ATTEMPT TO JUSTIFY THE SEIZURE IN SPITE OF THE UNLAWFUL ARREST IS FRIVOLOUS.

The Government has attempted to invoke the "plainview" doctrine as a defense to the charges of an unlawful seizure of the defendant's money.

First of all, the Government contends in its Trial Brief that, pursuant to the "plainview" doctrine, the Police could lawfully seize the money from the defendant's car once they had probable cause to arrest defendant on the weapons charge.

The Government seems to ignore the basic premise that where the arrest is unlawful, the seizure that accompanies the same is tainted and the property taken is suppressed as evidence. Furthermore, the peoperly seized was not contraband.

As pointed out in Point III of this Brief, the arrest on the weapons charge is illegal as the gun seized did not come under the definition of a "firearm" under the New York State Penal Law.

The Government's reliance at the suppression hearing on Fagundes v. U. S. (340 F. 2d 673) is erroneous. In that case the defendant was validly arrested on a driving while intoxicated charge. Hours later, while seeking to protect the defendant's car from the elements, a Police Officer noticed a bag of money in the back seat. He picked it up and turned it over to the Police Chief for safekeeping. Defendant has no quarrel with this case as the situation is entirely different.

In our instant case the money was seized pursuant to an unlawful arrest. The cases cited by the Government to justify the seizure of the money even with or without the "plainview" doctrine are based upon a lawful arrest.

It is indeed axiomatic that if the charge upon which the defendant was arrested was invalid, there obviously is no probable cause for the arrest and search and seizure.

It should also be pointed out that the Government's allegation that some of the seized money was found to have belonged to a bank has no validity in defending the wrongful arrest and seizure. An arrest is not justified by what a subsequent search discloses! (See Henry v. U. S.,361 U.S. 98; Johnson v. U. S., 333 U.S. 10)

Again, the seizure of the money from the defendant at no time was justified under any exception to the basic rule that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment, subject to a few well established exceptions.

Here in our instant case there is no contention by the Government that the money was willingly handed over by the defendant, that it was seized in hot pursuit, or that the Police knew the money was stolen. It was seized pursuant to an unlawful arrest.

It should be noted that neither the money, the rifle, the glasses, nor the box of bullets was contraband at the time of the arrest and, therefore, neither the alleged voluntariness of the original search nor the "plainview" doctrine would apply.

POINT V

THE SECTION OF THE NEW YORK STATE PENAL CODE, 265.05 (2), UNDER WHICH THE DEFENDANT WAS CHARGED, IS IRREBUTTABLE EVIDENCE THAT THE COLONIE POLICE KNEW THE SHAVING KIT CONTAINING THE MONEY, BULLETS AND SUNGLASSES WAS IN THE POSSESSION OF THE DEFENDANT.

In Point III of the Brief it was pointed out that the arrest was made based on the rifle, which is not a firearm under Section 265.00 of the Penal Law. As the rifle did not fit the statutory definition of a "firearm", the arrest was unlawful.

However, further review of Section 265.05 (2) of the Penal Law, which is fully set forth in Point III of this Brief, discloses that in order to violate this section not only must the accused have a "firearm" but he must have in his possession a quantity of ammunition which may be used to discharge the firearm.

Review of the testimony at the suppression hearing discloses that the only ammunition found was in the shaving kit at the store.

Therefore, it is obvious that the Colonie Police at all times held that the shaving kit with its contents belonged to the defendant, and he, therefore, was charged with violation of Section 265.05 (2).

Thereby, by the very charge lodged against the defendant, it may be seen that the Police relied on the possession of bullets by the defendant. Again, the only evidence of bullets presented at the suppression hearing was the finding of bullets in the shaving kit, which was not in the car when the rifle

was found by police.

POINT VI

THE GOVERNMENT'S BELATED RELIANCE ON THE NEW YORK STATE PERSONAL PROPERTY LAW TO CIRCUMVENT THE UNLAWFUL ARREST AND SEIZURE IS ERRONEOUS.

The Government has now placed reliance on the Personal Property Law of the State of New York to bypass the unlawful arrest and seizure of the defendant's personal property.

Section 252 (1) of the Personal Property Law is set forth as follows:

> "1. Except as provided in subdivision five of section two hundred fifty-six of this chapter or as otherwise prescribed pursuant to section two hundred fifty of the general municipal law, any person who finds lost property of the value of ten dollars or more or comes into possession of property of the value of ten dollars or more with knowledge that it is lost property or found property shall, within ten days after the finding or acquisition of possession thereof, either return it to the owner or report such finding or acquisition of possession and deposit such property in a police station or police headquarters of the city where the finding occurred or possession was acquired, or if the finding occurred or possession was acquired outside a city, in a station or substation of the state police or in a police station or police headquarters, including a sheriff's office, of the county, town or village where the finding occurred or possession was acquired." (Underscore mine)

As set forth in the statement of facts above, the night manager testified he gave the money to the defendant Lynch, who scooped it up and put it back in the shaving kit. He and the defendant Lynch verified that the entire amount was there. It is interesting to note at this stage that it is the defendant Lynch who is concerned over the exact amount still being there, as well as the manager.

Though there is some discrepancy between the two Colonie Police Officers' testimony as to who scooped up the money and placed it in the shaving kit, there is none as to the fact that the night manager gave the money to Lynch. Nowhere in the testimony is there any record that the night manager or the security guard gave the shaving kit and money to the Colonie Police. Even following the two officers' versions, at no point was the money deposited with the Police. Both Policemen testified to walking outside with Lynch because of the crowd in the store. The security guard said when outside and events were developing he asked for a receipt and he was told "We are in charge now." Again, nowhere is there a scintilla of evidence that the shaving kit was given by the store to anyone but Lynch. And, furthermore, this is consistent with Lt. Hahn's testimony that he reached in and pulled the shaving kit out of Lynch's car just prior to his formal arrest.

Therefore, it is obvious that what occurred is that, through the night manager, the shaving kit and its contents, including the monies, were turned over to the defendant Lynch by The Price Chopper.

In any event, there is absolutely no evidence that the shaving kit and its contents, including the monies, were turned over to the Police upon any version of the testimony. There is not a scintilla of evidence that the store turned the shaving kit with the monies over to the Police. Reliance on the lost and found section of the Personal Property Law of the

State of New York by the Government is a desperate position and is in fact ludicrous.

POINT VII

ALL SEIZURES MADE BY FEDERAL BUREAU OF INVESTIGATION AGENTS AFTER THE UNLAWFUL ARREST WERE "FRUITS OF THE POISON TREE" AND THE RESULTS THEREOF MUST BE SUPPRESSED.

POINT VIII

ALL STATEMENTS TAKEN BY FEDERAL BUREAU OF INVESTIGATION AGENTS AFTER THE UNLAWFUL ARREST WERE "FRUITS OF THE POISON TREE" AND THOUGH CONSISTENT WITH INNOCENCE MUST BE SUPPRESSED.

CONCLUSION

THAT THE ORDER OF THE TRIAL COURT DENYING THE SUPPRESSION MOTION BE REVERSED, THAT JUDGMENT OF CONVICTION BE SET ASIDE, AND THAT THE INDICTMENT BE DISMISSED.

Respectfully submitted,

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UNITED STATES DISTRICT COURT 74-CR 104

D. C. Form No. 100 Rev.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES *vs.* JOHN J. LYNCH 46 Phila Street Saratoga Springs, NY Jail	*For U. S.:* James M. Sullivan, Jr. Cullum *For Defendant:* E. David Duncan, Assgd. 100 State St., Albany

STATISTICAL RECORD	COSTS			DATE	NAME OR RECEIPT NO.	REC.		DISB.	
J.S. 2 mailed	Clerk								
J.S. 3 mailed	Marshal								
Violation	Docket fee								
Title									
Sec.									

DATE 1974	PROCEEDINGS
July 18	Filed Indictment-viol: T18 2113(a)-taking money from bank employee, 2113(b)-carrying money away with intent to steal, 2113(d)-assault bank employee with gun.
July 26	Defendant is arraigned and pleads not guilty. 3 cts JS2 20 days to file motions returnable Sept 4. Govt to file answering affidavit by Aug 30. Remanded to custody of Marshal.
Aug 27	Filed deft's motion for suppression-Sept 4 at Albany Filed deft's motion for bill of particulars, etc Sept 4 at Albany
Aug. 30	Filed Affidavit in opposition to deft. motion for suppression of evidence.
Aug. 30	Filed Affidavit in response to Deft. motion for bill of particulars.
Sept. 4	(1Motion for Bill of Particulars, by deft. 2Motion for Suppression by deft. 3Motion for an Order for deft. Lynch to be examined by psychiatr 1. granted only to extent that gov't has furnished particulars and furnish names of witnesses who reviewed line-up. 2. Deferred to time of trial. 3. Motion granted. Order signed-Dr. Friedman appointed.
9/4/74	Filed Order for deft. to be examined by psychiatrist. signed by Judge Foley on 9/4/74
9/11/74	Filed Psychiatric Examination . Not to be opened except by Order of Court

DATE	PROCEEDINGS
9/23/74	Filed Notice of Motion for Suppression of Evidence adduced at lineup and affidavit.
10/9/74	Filed CJA Form 21 copy 5
10/10/74	Filed Affidavit and Order directing Payment of Witness fees
0/16/74	Filed Government's Memorandum of Law
10/16	Suppression Hearing. Deft. waives 6 month rule for trial in Albany. Witnesses for Govt. Govt. rests. Decision reserved.
10/17	Witnesses for Deft. Deft. rests. decision reserved. Suppression of line-up-denied. Suppression of other material - reserved.
11/1	Filed Government's Supplemental Memorandum of Law
11/18	Filed Government's Brief
11/18	Filed Record of Proceedings of suppression hearing heard on 10/11/74
11/18	Filed Memorandum, Decision & Order denying motion to suppress evidence.
1/19	Trial moved by U. S. Attorney. J.E. Cullum for plaintiff, Lyons & Duncan for Deft. Jury drawn and sworn. 2 alternates drawn. Recess.
11/20/	Jury absent from courtroom. Psychiatric examination ordered on deft. Recess until 1:30. Trial continued. Alternate #1 takes Juror M.E. Sperbeck's seat. Jury excused until 10:00 a.m. tomorrow. Deft. moves for mistrial - motion denied. Recess until 9:30 tomorrow.
11/21	Court exhibit No.1 marked. Witnesses for Gov't. Jury absent from courtroom. Deft. moves for dismissal of Indictment on 3 counts - motion denied . trial continued. Witness for Deft. jury excused until 9:30 a.m. tomorrow. Deft. moves for Judgment of Acquittal - Motion denied. Court stands in recess until 10:00 a.m. tomorrow.
11/22	Trial continues. Judge rules on Requests to charge. Mr. Duncan sums up = Mr. Cullum sums up. Judge Foley charges jury. Alternate juror is excused. Jury finds deft. guilty on Count I: guilty on Count II: not guilty on Count III. Deft. moves to set aside verdict on Count I and Count II - Motion denied. Gov't. moves for sentencing. Pre-sentence investigation ordered. Sentence deferred without date. Remanded to custody of Marshal. Court declares mistrial on Count 3.
11/26	Filed defense requests to charge.
11/26	Filed Request for Jury Instructions.
12/11/74	The Court advised the defendant of his right to speak in his own behalf, deft. declined, his attorney spoke. Under T18 USC §4208(b) the court desires more detailed information as a basis for determining the the sentence to be imposed and commits the deft. to the custody of the Attorney General which commitment shall be deemed to be for the maximum sentence of 20 years on Count I and 10 years on Count II of the imprisonment prescribed by law for a study as described in §4208 (c). The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the Court within three months. Court directs that the defendant be transported forthwith to the institution where the study will be conducted. Remanded to the custody of the Marshal.
12/11/74	Filed Judgment. 2 copies U. S. Marshal 1 copy Probation
12/13/74	Filed Notice of Appeal
12/16	Transferred CJA 20 form from Mag. #52835
2/19	Filed executed Commitment - Lewisburg, Pa.
1/3/75	Filed Gov't. Exhibits 2 through 12, 15,16,18 and 19
1/6/75	Sent Certified copy of Record on Appeal to CCA, 2nd Cir.
7/75	Filed CJA Form 21, copy 5
1/10/75	Filed receipt of papers from USCA 2nd Cir.

74-CR-201

DATE	PROCEEDINGS
1/13/75	Filed copy 2, CJA Form 21.
1/17/75	Filed copy 2 CAJ Form 20
1/17/75	Filed Memorandum and Order of Judge Foley directing clerk to file certification and supporting papers to Judge Kaufman, in re compensation for Atty. Duncan.
1/29/75	Filed Transcript of proceedings held Nov. 19, 1974 at Albany, N.Y.
1/30/75	Filed CJA Form 21
2/18	Filed receipt for Supplemental Record on Appeal
3/17/75	The Court advised the defendant of his right to speak in his own behalf, defendant declined, his attorney spoke. Defendant is sentenced to the custody of the Attorney General for a period of seven years on each of two counts, to run concurrently, under 18 USC 4208(a)(2) The Court directs that an institution be selected where the defendant may received further psychiatric study and assistance. The court also directs that the defendant be transported forthwith to a federal institution. Remanded to the custody of the Marshal.
3/18/75	Filed Judgment and commitment - 2 copies Marshal.
3/18/75	Filed Notice of Appeal
3/19/75	Filed Court Exhibits 1 thru 8.
3/19/75	Sent Certified copy of Record on Appeal to CCA, 2nd Cir.
3/21/75	Filed receipt for certified copy of record on appeal from CCA, 2nd Ci
3/24/75	Filed Order from A. Daniel Fusaro dated March 20, 1975 re: Appeal, stating argument of the appeal will be heard during week of 6/2/75, e
3/26/75	Filed Sentencing minutes of March 17, 1975
3/26/75	Forwarded certified copy of sentencing minuted and supplemental clerk's certificate to C.C.A.
4/7/75	Filed Commitment executed April 3, 1975 to U. S. Penitentiary, Atlanta, Georgia
4/7/75	Filed Receipt for Papers sent on Third Supplemental Appeal.

INDICTMENT

COUNT I

THE GRAND JURY CHARGES:

That on or about the 7th day of June, 1974, at Schenectady, in the State and Northern District of New York, JOHN J. LYNCH, the defendant herein, knowingly, wilfully, and unlawfully, by intimidation, did take from the person and presence of Jean Stalpinski, an employee of the Community State Bank, 224 State Street, Schenectady, New York, approximately $2,750.00 in money belonging to and in the care, custody, control, management and possession of the said Community State Bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation.

In violation of Title 18, United States Code, Section 2113(a).

COUNT II

THE GRAND JURY FURTHER CHARGES:

That on or about the 7th day of June, 1974, at Schenectady, in the State and Northern District of New York, JOHN J. LYNCH, the defendant herein, knowingly, wilfully and unlawfully did take and carry away, within intent to steal and purloin from the Community State Bank, 224 State Street, Schenectady, New York, the deposits of which were then insured by the Federal Deposit Insurance Corporation, certain money aggregating approximately $2,750.00, belonging to and in the care, custody, control, management and possession of the said Bank.

In violation of Title 18, United States Code, Section 2113(b).

COUNT III

THE GRAND JURY FURTHER CHARGES:

That on or about the 7th day of June, 1974, at Schenectady, in the State and Northern District of New York, JOHN J. LYNCH, the defendant herein, by intimidation, did take from the person and presence of Jean Stalpinski, an employee of the Community State Bank, 224 State Street, Schenectady, New York, approximately $2,750.00 belonging to and in the care, custody, control, management and possession of the said Community State Bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, and JOHN J. LYNCH, in committing the aforesaid offense, did assault the said Jean Stalpinski and put in jeopardy the life of the said Jean Stalpinski by means and use of a dangerous weapon, to wit: a gun.

In violation of Title 18, United States Code, Section 2113(d).

A TRUE BILL

/s/ EVERETT D. WARKWARDT
FOREMAN

/s/ JAMES M. SULLIVAN, JR.
UNITED STATES ATTORNEY

MEMORANDUM-DECISION AND ORDER

The defendant is indicted in three separate counts for violations of separate sections of the federal Bank Robbery statute. 18 U.S.C. 2113(a), (b) and (d). Among several motions filed in his behalf were a general one for suppression, and a separate one specifically to suppress any evidence adduced at a lineup at the Albany County Jail. The general motion to suppress sought an order suppressing and prohibiting the use as evidence of all personal property and statements illegally and unconstitutionally taken from the defendant. There is no description of any personal property. A hearing on the motions was held before me on October 16 and 17, 1974. The minutes have been transcribed and were furnished to me Friday, November 15, 1974. As the transcript discloses at the end of the hearing, I denied the motion for suppression of the evidence adduced at the lineup on the ground there was no showing of impermissible suggestiveness or unfairness in the conduct of the lineup (Tr. 250-251). Decision was reserved on the motion that in effect raised questions of illegal search and seizure or violation of constitutional rights in the taking of oral or written statements from the defendant.

A substantial record was compiled. On the material issues involved in the search and seizure and taking of statements motion, three Town of Colonie police officers, three FBI Agents, a store manager and Security Officer of a

Price Chopper Market at Latham, New York, and the defendant Lynch testified. The testimony developed the fact that the particular items alleged to have been obtained by an unreasonable search and seizure prohibited by the Fourth Amendment are the stock portion which had been sawed off from a .22 Rifle, the barrel of the rifle itself, and $1,212.00 in money and a box or boxes of .22 caliber ammunition.

The events as in many of these situations when searches, seizures and arrests by law enforcement officers take place in short periods of time are unusual. The incidents arose when the defendant left or lost a leather shaving kit at the Price Chopper Market with the substantial amount of money ($1,212.00), sun glasses, and a box with some cartridges in it on the night of July 6, 1974, and came back to the supermarket about half or three quarters of an hour later to reclaim the kit and its contents. It was then that the two Colonie Police officers came on the scene, and began questioning the defendant at the counter of the store where the defendant was making the claim to the store manager that it was his money, and the money was being counted out on the counter. Shortly thereafter, when people in the store began to crowd around and it was about midnight, the two officers moved out into the lighted parking lot where the conversation continued with the defendant. Then one of the officers went to the defendant's Mercury automobile, 40 or 50 feet away, in the parking lot to turn off the motor which the defendant had left running when he went into the supermarket. The

discovery then occurred, by the officer, that there was a stock of a rifle in the passenger front seat of the car, with the rifle barrel partially covered by a sheet in the rear seat and a box of .22 ammunition there. Then the superior of the two Colonie officers arrived, Lt. Hahn, and after further discussions that did not take too long, the defendant then was placed under arrest for violation of the Penal Law, New York, Section 265.05. From this factual statement simply put, several weighty issues from the seizure of the money, stock, rifle and cartridges are presented that must be given serious consideration in accord with the principles laid down in extensive opinions of the United States Supreme Court. As happens in these testimonial hearings, there are inconsistencies, and even contradictions, that must be evaluated in order to arrive at findings and conclusions acceptable to my judgment.

After careful review, it is my finding from the record made before me that if it is to be considered that all the items, the stock and barrel of the rifle, the money, and the cartridges were taken from the Mercury automobile of the defendant then in a large parking area open to the public, that the articles were taken by the police officers with the voluntary consent of the defendant, free from coercion by the police at the scene. The most current decision of the Supreme Court on this question of voluntary consent in a situation of this kind is Schneckloth v. Bustamonte, 412 U.S. 218 (1973), and it is emphasized therein that voluntariness of consent is to be determined from the totality of circum-

stances as a question of fact. (p. 227). See also U.S. v. DeMarco, 488 F. 2d 828 (2d Cir. 1973).

Important support for my finding and conclusion that there was voluntary consent comes from the testimony of the defendant himself. It is even questionable whether the stock and barrel of the rifle were seized after search because the testimony of the defendant was that he did not think there was anything illegal about the gun and he let them take the gun, and in fact showed it to Lieutenant Hahn (Tr. 170, 190-194). This attitude of consent, at that time and throughout the incidents, for some reason existing in the mind of the defendant, is also evidenced later when he signed consents for the FBI to search the automobile and his apartment after his arrest. (Tr. 125).

Further, I find acceptable and credible the testimony of the officers that defendant Lynch agreed to let one of the officers turn off his motor that was overheating, and told them that if they wanted to look at the gun, go ahead. (Tr. 16, 18, 38, 39, 69). If the consent finding is in error, there would in my judgment be the invocation properly of the plain view doctrine that would allow the seizure by police of the articles in the car to be upheld as based upon probable cause. (Tr. 70-72, 82-86). See Coolidge v. New Hampshire, 403 U.S. 443, 465-72 (1971).

My analysis of the testimony leads me to the finding that the money, the $1,212.00 in bills, never came into the possession of the police by any search or seizure involving the

defendant or his automobile. The money had been lost by the defendant, and after he reclaimed it, everyone was being careful about the return of such a large sum to him, particularly so, when he was reluctant to identify himself. The police officers when they were called by the store manager and store security officer had the responsibility under New York law to return it to the rightful owner or retain it until proper disposition could be made. N.Y. Personal Property Law, Sections 252, 253, 254). I find from the testimony that the police had actual possession and custody of the money by taking it from the store counter, and at least constructive possession of it when placed later in the defendant's car. I find that officer Leonard first took the money and other articles in the shaving kit off the store counter when he, Sergeant Roland, and defendant Lynch went outside into the parking lot. (Tr. 14, 20, 32, 39, 46-48, 68). I find also there was probable cause to arrest the defendant for violation of Penal Law, New York, Section 265.05, prohibiting possession of firearms that may be concealed. The important consideration at that stage is the presence of probable cause then and the outcome of the charges is immaterial to that determination.

It must be said that to my mind the police officers made sound judgments to interrogate and investigate carefully before arrest was made. As was stated in Adams v. Williams, 407 U.S. 143, 145 (1972), the Fourt Amendment does not require a policeman who lacks probable cause to arrest to simply shrug shoulders and allow a crime to occur or a criminal to escape.

See also Terry v. Ohio, 392 U.S. 1, 22 (1968); Chambers v. Maroney, 399 U.S. 42, 50-51 (1970).

In regard to the suppression of oral admissions or written statements of defendant, it was stated there were no written statements obtained. Oral admissions were shown to have been made before the defendant was placed under arrest or in custody. When placed in custody, the defendant was given the Miranda warnings before interrogation by the Colonie police and the FBI Agents. Miranda v. Arizona, 384 U.S. 436 (1966) relates to custodial interrogation only.

The motion to suppress use of personal property and statements as evidence is denied in its entirety and dismissed. It should be noted that this opinion was drafted Saturday, November 16, 1974, to be filed and distributed to the attorneys on Monday, November 18, 1974. Inasmuch as the trial of the case is scheduled for Tuesday, November 19, I did telephone Attorney Duncan on Saturday morning, November 16, and advised him of the conclusion stated herein to deny the motion.

It is so Ordered.

Dated: November 18, 1974

Albany, New York

s/ James T. Foley

UNITED STATES DISTRICT JUDGE

MOTION FOR SUPPRESSION

SIRS:

PLEASE TAKE NOTICE that upon the annexed duly verified Affidavit of E. David Duncan, Esq., on the Indictment found against the defendant, and upon all the proceedings herein, a motion will be made pursuant to the Rules of Criminal Procedure at a term of the United States District Court for the Northern District of New York, to be held at the Federal Building in the City of Albany, New York, on the 4th day of September, 1974, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an Order suppressing and prohibiting the use of all personal property and statements illegally and unconstitutionally taken from the defendant, John J. Lynch, and same be ordered excluded as evidence against the defendant, John J. Lynch, and for such other and further relief as to the Court may seem just and proper.

DATED: August 23, 1974.

Yours, etc.

LYONS AND DUNCAN
Attorneys for Defendant
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Phone: (518) 4632196

TO:
HON. JAMES M. SULLIVAN, JR.
UNITED STATES ATTORNEY
Northern District of New York
BY: JAMES M. CULLUM
Assistant U. S. Attorney
Federal Building
Albany, New York

J. R. SCULLY, CLERK
UNITED STATES DISTRICT COURT
Northern District of New York
Federal Building
Albany, New York

AFFIDAVIT IN SUPPORT OF SUPPRESSION MOTION

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

E. David Duncan, being duly sworn, deposes and says:

That he is the appointed attorney for the defendant, John J. Lynch, and respectfully submits this Affidavit in support of the application for an Order suppressing as evidence certain property unlawfully seized from the defendant, John J. Lynch, in violation of the laws of the State of New York, the United States and the United States Constitution.

That this Affidavit is based on information and belief, the basis of which is the investigation conducted by this deponent and information supplied by the defendant, John J. Lynch.

That on the 7th day of July, 1974, the defendant left a shaving kit with certain monies contained therein on a counter at the Price Chopper on Route 7 at Colonie, New York. Upon his return to pick up his bag, it was returned to him by Private Security Guards, but upon the arrival of the Town of Colonie Police he was questioned again without any basis that a crime had been committed, and the defendant was ordered to point out his car, which was then searched by the Town of Colonie Police without a warrant, without his permission, and not in conjunction with a lawful or unlawful arrest.

That upon the search of the defendant's car, a rifle was discovered therein and seized by the Town of Colonie Police. This seizure was unlawful and unconstitutional.

That following this unlawful seizure, the defendant was wrongfully arrested on the charge of violation of Section 265.05 of the New York State Penal Law for illegal possession of a weapon.

That upon his immediate arrest without a warrant, his monies were seized from him as well as other items of personal property from his person and from his car.

That based upon the complaint upon which the defendant Lynch was arrested by Federal Officers and the Affidavit by Special Agent Phillip D. Kessinger of the Federal Bureau of Investigation attached to said complaint, the personal property seized pursuant to the alleged search and seized by the Town of Colonie Police and the illegal search and seizure of personal property seized following his illegal arrest were the bases for the arrest by Federal Officers and the subsequent indictment of the defendant.

Therefore, as the aforesaid searches, seizures and arrests were unlawful and in violation of the New York State Constitution and the United States Constitution, and, furthermore, it appearing that those items seized and statements taken in conjunction therewith will be offered in evidence by the United States Attorney, it is apparent that the same should be suppressed.

WHEREFORE, it is respectfully requested that an Order be entered suppressing the evidence wrongfully seized herin and the same be ordered excluded as evidence against the defendant, and, furthermore, that any statements made by the

defendant in connection with the above set forth events be suppressed.

s/ E. DAVID DUNCAN
E. DAVID DUNCAN

Subscribed and sworn to
before me, this 23rd day of
August, 1974.

s/ HELEN T. CONNOLLY
HELEN T. CONNOLLY
Notary Public State of New York
Residing in Rensselaer Co.; Comm. expires 3/30/76

INFORMATION/COMPLAINT (Secs. 100.05-100.30 CPL) A-16

TOWN OF COLONIE, COUNTY OF ALBANY, N.Y.

PEOPLE OF THE STATE OF NEW YORK)
vs.)
) ss
John J. Lynch)

I, Walter Leonard (police officer), the COMPLAINANT herein, ACCUSE John J. Lynch, the DEFENDANT in this action and charge that on or about the 7 day of July, 19 74, at Price Chopper Rt. 7 in the Town of Colonie, County of Albany, New York, at about 1:17 o'clock in the Eore noon, said DEFENDANT did *intentionally-knowingly-~~recklessly~~ and unlawfully COMMIT THE ~~*traffic infraction-violation-misdemeanor-felony~~ OF MISDEMEANOR Possession of Weapons & Dangerous Insts. & Appliances contrary to the provisions of Section 265.05, subdivision 2, of the Penal Law of the State of New York.

THE FACTS ON WHICH THIS ACCUSATION IS MADE ARE OF MY OWN KNOWLEDGE AND ON INFORMATION AND BELIEF AS FOLLOWS:

A. OF MY OWN KNOWLEDGE

The said defendant at the aforesaid time and place did possess a 22 cal. Lever action rifle with the stock sawed off and had a quanity of .22 Caliber Ammunition in his possession on the back seat of his car in the parking lot of the Price Chopper on Rt. 7 Town of Colonie, County of Albany New York, All Contrary to the provisions of the statue in such case made and provided.

B. ON INFORMATION AND BELIEF

WHEREFORE I REQUEST THAT A WARRANT BE ISSUED FOR THE ARREST OF THE DEFENDANT

W J Leonard
Complainant

NOTE: False statements made herein are punishable as a Class A misdemeanor pursuant to Section 210.45 of the Penal Law.

**Sworn to before me this 14 day of Jul, 19 74

Lt. Raymond G. Hale
(Signature)

Detective Commander
(Title)

DEFENDANT'S EXHIBIT B id. Rec'd 11/21/74

*Strike all words not applicable - ** Need be sworn only if Court specifically requires. (Sec. 100.30 CPL)

BY MR. CULLUM:

Q What happened after that?

A I asked him if he could tell me where the money in total came from, and at this point he said "I don't have to tell you anything, all I want is my money back and my gun and I want to leave."

I at this point told Sargeant Roland and Officer Leonard to take him into custody, advise him of his rights and transport him to Colonie Police Headquarters. And I further informed him that I would take custody of the money, the bag containing the money and the weapon, and I would come to the police station with this material.

Q Did you take anything else out of the car besides the money?

A Yes, I did.

Q What else did you take out of the car?

A I took a stock portion of a rifle.

Q How did you know that was in the car?

A When I reached in to take the bag containing the money off the front seat, this portion of the rifle was laying on the front seat adjacent to where the money was located. I observed it at that point.

Q Did you remove it at that point?

A No, I didn't, I removed it at the point I was going

going to wipe the dust out of your eyes and look at what happened here. The man robbed a bank. The people that saw him say yes, this is he, and a month later he shows up with the money taken from the bank. That is an important thing. That is what you got to consider. Ladies and gentlemen, I took an oath to present the evidence in this case to you. I hope I have lived up to it. Now it is your turn. You got to take this proof, and it is overwhelming, and do your duty, live up to your oath.

All I ask of you is that you just take the testimony that came from that witness stand as it was presented to you and consider it fairly. If you will do that, you will find the defendant guilty.

THE COURT: Alright, make the annoucement Mr. Clerk.

THE CLERK: The Judge is about to charge the jury. All persons wishing to leave the courtroom should do so now. Nobody will be allowed to leave the courtroom while the Judge is charging the jury.

POLEY, J:

Ladies and gentlemen, we are in the fourth

day of our trial of this criminal prosecution. As I told you when I examined you on last Tuesday, we wanted to have a fair and impartial jury. I also told you that you have a very important responsibility when you sit as jurors, particularly in a criminal case and I am sure you have that realization yourselves by now. But it is my duty now to instruct you on the law that you must apply to the evidence that came into this trial during this three day period. And that evidence of course came to us from the mouths of the witnesses, from the exhibits that you saw marked, and you can only consider the ones that are received in evidence. After I finish my instructions, and they are quite lengthy, because I must cover all the points that the criminal law in this trial says must be covered, it will then be your most important duty to decide the guilt or innocence of this defendant, John Lynch, upon each of the three separate counts with which he is charged and your verdicts must cover.

I tell you now that your verdict, one way or the other on each of the three counts, guilty or not guilty, and you must cover them

each separately, they are separate charges of crime against this defendant Lynch, your verdict must be unanimous. Twelve of you must agree one way or the other on each of the counts.

I will tell you in the beginning, and I have told many juries--I have been on the Bench a long time--you people are what we call the judges and triers of the facts. Your recollection of the facts in the case gained from the evidence governed above my recollection of it, governed above that of the attorneys as they stated during their summations, their recollections of certain phases of the evidence. I can tell you from long experience that your collective recollection is always excellent. I have been surprised often at the end of trials by the recollection of the jury as a whole about the incidents during the trial that the Judge and lawyers may not be too clear about.

In acting as jurors it is your prime function to decide the credibility of the witnesses who testified before us. And that is an important function because it is your search

here as it is in most of our litigation, your search is for the truth of the situation. Whether it is a truth or lie. And that determination can only be made logically and fairly from the testimony of the people who came before us. So you should judge credibility of the witnesses just the same as you would measure up or judge people in your daily lives.

Remember the demeanor of each of the witnesses, their background as they gave it to us, their candor as it might have been demonstrated as they spoke, their interest that might possibly color their testimony; their honesty in answering. Was their testimony reasonable and probable under all the manners that we had portrayed throughout this trial. I give you those examples only as facts that you should use in weighing the credibility of the witnesses.

Now during the trial I made various legal rulings. You heard them. Ruling on objections and on motions. I tell you again those problems, the rulings I made are not your concern and the rulings I make only reflect my best judgment as to the rules of evidence

and procedure that I think control that particular question. I never pretended to be infallible and all I can tell you is that those judgments are made in the interest of fairness and based upon my knowledge and experience.

Now during all trials comments are made by attorneys and made in good faith, and statements made by me, by myself, but I mention to you again statements by attorneys during the trial, statements during summations, of course, are entitled to your respectful consideration. But those statements and even my statements and comments made during a trial are not to be considered as evidence that is to be weighed by you.

So you should remember that and consider that it is only the testimony and the exhibits that you must consider in your discussions.

Now we are going to talk again about the indictment. As I told you in the beginning, this is just an accusation returned by a grand jury. It has three counts. I am going to read them to you again, right after I tell you about this. This indictment is merely a written

accusation of the alleged violation of the Federal Law. It can be considered to no extent as evidence for or against the government. It is a writing, no more and no less, returned by a grand jury and it contains these charges and the material elements of those charges, under our system, must be proven by the evidence offered by the prosecution beyond a reasonable doubt.

Now the charges are these, and I will read them to you, at least talk about them, because there are similarities in each of the counts.

Count I, and I know by this time you are much more enlightened about the circumstances involved than you were when I first examined you.

The grand jury charges that on or about the 7th day of June, 1974, at Schenectady, in the State and Northern District of New York, John J. Lynch, the defendant herein, knowingly, wilfully and unlawfully, by intimidation, did take from the person and presence of Jean Stalpinski, an employee of the Community State Bank, 224 State Street, Schenectady, New York, approximately $2750.00 in money belonging to

and in the care, custody, control, management and possession of the said Community State Bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation.

We have evidence about all the material issues raised by this charge. That is Count I.

Count II is a separate charge involving the same incident and involving the same defendant, but it does charge that this defendant on this date, June 7, 1974, did take away and carry away with intent to steal and purloin from this bank, the deposits again being insured by the FDIC, certain money, again aggregating $2750.00.

The third count is a separate charge of crime against this defendant, and it involves the same date and it says that by intimidation that this defendant did take from the person and presence of Jean Stalpinski--we know about this lady, she was a teller at the bank on that day--that he did take this amount of money that was in the possession of the bank on that particular day, and that in committing this offense, and these are the important words that distinguish this count, in the indictment

from the other two counts, "that he did assault the said Jean Stalpinski and put in jeopardy the life of the said Jean Stalpinski by means and use of a dangerous weapon, to wit: a gun."

So you see we have those charges here. There are similarities but there are differences, and you must relate the evidence that we have to those particular counts, the similarities and the differences, to decide whether you unanimously say you return a verdict of guilty or not guilty on each or any of the three counts.

I tell you these general four essential elements are required to be proved by the government beyond a reasonable doubt in order to establish the offense charged in Count I.

Count I is the charge that alleges the money was taken by intimidation of Jean Stalpinski. It must be established first that the deposits of the Community State Bank in Schenectady were at that time of the alleged offense insured by the Federal Deposit Insurance Corporation.

You remember the evidence along that line. There was a certificate brought in here, it is

one of the exhibits now before us. It must be established that the act or acts of taking this money from the person and presence of Jean Stalpinski was money belonging to and in the possession and control of the bank.

It must be established, third, that the act or acts of taking such money on June 7, 1974, from this teller was done by means of intimidation.

And four, that those acts as indicated was done wilfully.

Now in regard to Count II, it must be established again that the deposits of the bank were insured by the Federal Deposit Insurance Company. Count II is the charge that the money was taken, carried away from the bank with intent to steal it. In Count II it must be established that this amount of money was taken, $2750.00, was in the custody and possession of the bank, and also that those acts were done with intent to steal and purloin or take the money unlawfully.

Now in Count I and Count III we have the important words "by intimidation." And I will tell you what that means under our Federal Law.

It means wilfully to take it by putting in fear of bodily harm, and such fear must arise from the wilful conduct of the person allegedly committing the offense rather than from some tempermental timidity or part of her nature on the part of Jean Stalpinski, and I do tell you however that the fear of this woman as she described it to us may not be so great as to result in terror, panic or hysteria.

A torquing by intimidation must be established by identity of one or more acts or statements of the person committing the offense which were done and made in such manner and under such circumstances as produced in your judgment the feeling that there was in the ordinary person a fear of bodily harm.

I just tell you to review the evidence in that regard. We can give these legal terms and these legal definitions, but essentially it is a matter of using your own common sense and judgment regarding the situation as we heard it described. Actual fear cannot be proven by the government. Fear may be inferred, and again I tell you, from statements and acts done by the person committing the offense.

Remember the particular details that we were given by this woman teller as to the circumstances that arose at the time of the hold up, the package being there, the note being delivered and then taken back, and all those circumstances that you think should be weighed in regard to this question of taking the money by intimidation.

On Count III we have a dangerous weapon and the charge is a gun, that we must talk about.

In order to find this defendant Lynch guilty on this Count III, that this money was taken from her not only by intimidation but further it is charged that her life was put in jeopardy by means and use of a dangerous weapon, the specifically stated gun. I charge you that a dangerous weapon includes anything capable of being readily operated, manipulated, or otherwise used to inflict severe bodily harm or injury upon any person. A portable firearm such as a pistol, revolver or other gun capable of firing a bullet or other ammunition may be, if you so find it from the evidence beyond a reasonable doubt, to be a dangerous weapon or

device. In this case I charge you that if the gun was used in the commission of the offense and you find it so from the evidence presented to us, you may infer that the gun was loaded even though there was no direct evidence of that circumstance at this trial.

I tell you that under the definition, to put in jeopardy the life of Jean Stalpinski means to expose her by a risk of death by the use of a dangerous weapon.

So the issue in this respect, and to keep it clear, that this Count III, a separate count, is not whether the woman was afraid but rather from the objective point of view from your review of the evidence, she was in a state of danger.

Now we do have, ladies and gentlemen, terms now again to our charges of crime in our system of law, the terms wilful and unlawful.

Wilful, of course, means knowingly doing so act with a bad purpose and bad intention and it is distinguished from anything that is unusual or inadvertent or done through carelessness or error.

Now intent is a state of mind, which implies

a purpose and intention of wilfulness. It is seldom proven by direct evidence but it may be inferred from the acts of persons or a combination of the acts of the person involved. We have not discovered anything yet that can look into the minds of individuals and tell us what was in the mind at a particular time and place. But I do tell you that ordinarily persons are presumed to have intent by what they voluntarily do to enjoy the natural consequences of their actions.

Now there are certain rules, and I did talk about them briefly when I examined you as jurors, certain rules applicable to every criminal trial, and it is your duty to apply those rules and determine the question of fact that we have involved here. Those rules relate to the presumption of innocence and the doctrine of reasonable doubt.

The defendant in this case, John Lynch, is presumed to be innocent until the contrary is proved. That presumption of innocence continues with him throughout the trial until his guilt is proven beyond a reasonable doubt to your satisfaction. When his guilt is so proven

that presumption of innocence is overthrown.

The defendant Lynch is not called upon to establish his innocence. The burden of proof, of proving his guilt rests upon the prosecution throughout the case. The defendant Lynch is entitled to the benefit of reasonable doubt upon the whole case, upon all the evidence and lack of evidence in the case and if there is a reasonable doubt upon any material question necessary to his conviction upon either of the three counts, it must be resolved in his favor.

I do tell you this, ladies and gentlemen, that reasonable doubt is not a mere whim or a guess or a surmise, nor can it be any subterfuge to which resort you have in order to avoid doing a disagreeable thing. It is such a doubt as reasonable men and women, like yourselves, may entertain after a careful and honest review and consideration of all the evidence in this case. It must be grounded in reason.

The Government has the burden of proving the charges in each of the counts beyond a reasonable doubt, but it does not have the

burden of proving the charges beyond all doubt.

So it is a doubt, a reasonable doubt, and this is a classic definition arising from the evidence or lack of evidence after consideration of all of it, and it can only be such a doubt as would cause reasonable men and women like yourselves after listening to the evidence, to hesitate to act upon it in matters of importance to yourselves.

Now we have a principle of law in regard to admissions, or statements, and we did have testimony about statements made by this defendant Lynch in regard to money and so forth, and you remember that testimony that was allowed in evidence during the trial. So you should weigh those admissions with caution. Scrutinize the circumstances surrounding them to determine whether or not they were made freely and voluntarily or whether there was any coercion, physical or psychological, involved. It is for you to decide ladies and gentlemen, whether such admissions have any factor of incrimination in them, and whether or not they tend to establish guilt, or whether they tend to establish innocence.

Now we have in this case, and we have it in probably all of our trials, the question of circumstantial evidence. And I tell you that circumstantial evidence may be received, and it is always received, when proper, and it is entitled to such consideration that you jurors find it deserves, depending upon the inferences you think it necessary and reasonable to draw from such evidence. No greater degree of certainty is required when the evidence is circumstantial than when it is direct, for in either case you must be convinced beyond a reasonable doubt of the guilt of this defendant, John Lynch.

Circumstantial evidence consists of facts proven from which you as jurors may infer by process of reasoning other facts thought to be established as true. When such evidence is capable of an interpretation which makes it equally as consistent with the innocence of a party as with his guilt, that meaning must be ascribed to it which accords with his innocence. In considering circumstantial evidence you are not allowed to drawing inferences most favorable to the defendant. Circumstantial evidence

is not any different or of a lower plane than other forms of evidence. So I tell you this, the defendant can be proven guilty beyond a reasonable doubt by either direct or circumstantial evidence.

Direct evidence is testimony by one who comes in and asserts actual knowledge, such as an eye-witness. Circumstantial evidence is proven by a chain of facts and circumstances indicating the guilt or innocence of a defendant. I tell you that the law makes no distinction between the weight to be given to either direct or circumstantial. It only requires that you people after weighing the evidence must be convinced of the guilt of this defendant beyond a reasonable doubt.

Now an important factor of course in this case that demonstrates circumstantial evidence was shown by the rifle and the stock that were received in evidence for your consideration. I think they are marked, if I am correct, Exhibit 12 or 13. That marking is just done to identify them so that we can keep track of them.

As to the gun, there was a description by

two of the tellers. Joan Stalpinski talked to us about it as to what they saw regarding what was wrapped up in paper during this hold up, that undisputedly took place on June 7, 1974 in the bank and she told us, Mrs. Stalpinski, as I remember, and it is for you to decide what was said, that she saw five or four inches of black metal with a hole at the end and I think she said a shell could fit in the hole that was observed.

And the other teller told us what she noticed about the end of the package and what it appeared like to her.

As you know, ladies and gentlemen, we have no direct evidence that the rifle and stock that were found in the car of the defendant in July were the ones actually used at the time of the hold up. But these descriptions, and they are not too detailed, are ones for you to consider to decide the weight that you wish to give to the presence of this gun and this stock that were found in the car of the defendant at the time of his arrest, and the weight that you want to give accusation charging this defendant with the crime with which he is

charged in this indictment.

It is important that you be very careful in weighing the type of evidence in this regard as to whether it justifies and inference that the prosecution wants you to draw in this regard, and whether you wish to consider it as one of the factors that link this defendant Lynch to the bank robbery of June 7th. It is for you alone to consider this evidence to determine the inferences which you think proper to draw as to the likelihood of this gun and this stack being connected with the hold up that occurred on June 7 in Schenectady.

I'm going to charge you these doctrines and this relates to the money that was found and the money--you have in that regard these statements as statements made by the defendant when he claimed the money.

Possession of property recently stolen if not satisfactorily explained is ordinarily a circumstance which you as jurors may reasonably draw an inference that you see fit and find in the light of surrounding circumstances shown by the evidence in the case, that the person in possession knew the property was stolen or

was implicated in this theft. Possession of property recently stolen is also ordinarily a circumstance from which you may reasonably draw an inference, if you see fit it, in the light of the surrounding circumstances shown by the evidence, that the person in possession of this property was in some way involved in its theft. That is a repetition but it is important to keep in mind. The term recently is a relative term and has no fixed meaning. Whether property may be considered as recently stolen depends of course upon the nature of the property and all the facts and circumstances shown of course in the case. The longer the period of time from the theft, the more doubtful becomes the inference which may be drawn reasonably from unexplained possession.

In considering whether possession of recently stolen property, and we are talking about the money here now, in considering whether this possession has been satisfactorily explained, I must remind you in the exercise of constitutional rights the accused need not take the witness stand and testify. There may be opportunities to explain possession by a showing

of other facts and circumstances independent of the testimony of the defendant.

So you have to keep that in mind, that the law never imposes upon a defendant in any criminal case the burden of calling any witnesses or producing any evidence.

Now another important problem we face in this case is the question of identification. It was emphasized in the summations of both attorneys, and this is known in the law as an important consideration, and I must instruct you strongly upon the way you should evaluate this type of testimony. I tell you that having heard testimony of the witnesses who came here and identified this defendant which has been received and it is received, and it must be reviewed by you with caution. You should consider the opportunity that each of these witnesses had to observe, the time element involved, the conditions, all this type of circumstance, and you determine the credibility and reliability of their identification. You should place yourselves in the position of the participants as it was told to us by the witnesses as they outlined it for us. It is

nothing unusual in this type of case to have this type of testimony. The only thing that we instruct jurors is to be careful about it, because at times there can be mistaken identification. So it is for you to decide, ladies and gentlemen, whether these witnesses who identified this defendant in this courtroom were swayed by any outside interest to testify to anything other than what they thought was the truth; whether their testimony was colored in any way by any outside interest in the outcome of the case, and whether or not you are willing to accept each of the identifications made before us as being credible and reliable. So you should also in this regard, and of course it came in during the trial, remember the line up testimony that we had. It is for you to decide what bearing that had upon the particular identification we had here made in the courtroom, whether that line up was conducted fairly and properly; whether identifications on that line up were done without any improper suggestion by any of the law enforcement agencies, or officers.

So you should go over that kind of evidence,

the identification testimony, review it amongst yourselves and I do charge you again that there is a necessity for you to use caution in what weight you wish to give the identification. It is for you to decide after this review whether or not you are willing to accept this identification testimony and find it as supported beyond a reasonable doubt, that this defendant Lynch was the person who committed this bank hold up of the Schenectady Bank on June 7.

I do charge you strongly that you cannot consider and talk about in any way the fact that this defendant Lynch did not take the witness stand before us. You can't be too careful during your deliberations to safeguard the right that the law gives him in that respect. My advice, ladies and gentlemen, is don't talk about that situation at all during your discussions in your jury room. The law does not compel a defendant to take the witness stand to testify and no presumption of guilt may be raised and no question of any kind and no inference of any kind may be drawn from the failure of a defendant to take the witness stand.

I am at the conclusion of my instructions, but I do have other requests to charge to talk to you about.

I do ask you ladies and gentlemen to take the evidence, decide the issues squarely, fairly, impartially and intelligently as to this defendant Lynch. Don't allow sympathy, passion or prejudice of any kind to influence your judgment. Use your minds, your good minds, your every day common sense. Weigh the evidence and I am sure that you will come in with a just and true verdict. Do the right thing. If you honestly believe that the government has not proven beyond a reasonable doubt, the guilt of this defendant, beyond a reasonable doubt, on any or all of the three counts of crimes with which he is charged, then your verdict should be not guilty on those counts. Equally so, if you are satisfied that this man is guilty beyond a reasonable doubt after reviewing the evidence, you should convict him. I tell you that with the consequences of your verdict you have nothing whatever to do. The law fixes those consequences. That is my responsibility. You should not discuss any

consequences during your deliberations.

I tell you again your verdict must cover each of the three counts separately. You must announce it as guilty or not guilty on each of the three counts.

Under our system when you go to your jury room, and I think we are different from the state courts, it is for your group to designate a member from your group as to whom you wish to act as foreman in the event that you come back to the court for instructions and also to announce the verdict on the counts, if you reach a verdict on each of the three counts.

As far as our exhibits are concerned, unless the lawyers make some agreement otherwise, ordinarily in these criminal cases you designate in writing by description or number, if you wish, if you can remember the exhibit number, the exhibits that you want delivered in your jury room. I do tell you that any documents or records that may have been offered and not received in evidence are not to be considered by you to any extent.

Before we get to the requests to charge, I will ask Mr. Duncan, do you have any objections

to the charge?

MR. DUNCAN: Your Honor?

THE COURT: Do you have any--I can excuse the jury.

MR. DUNCAN: I have one I would like to comment on.

THE COURT: Alright, ladies and gentlemen, I am going to excuse you from the courtroom for five minutes or so. We have to have these legal discussions. Then I will bring you back for further discussion.

(Whereupon at 12:00 o'clock noon the jury retired from the courtroom).

THE COURT: Alright, Mr. Duncan.

MR. DUNCAN: One objection to your charge is to the presumption arising from the possession of stolen money. I felt that the charge went in such a manner that it almost inferred or said that he was found in possession of it. Perhaps I over-reacted to it or over-reached, but I think that was my understanding.

THE COURT: My intention was only that they can only accept the statements that he made, that were told by the police officers and the store employees that he did make a claim to

this money in several instances.

MR. DUNCAN: I think, Your Honor, the proof went to, that he came in and did make a claim for his shaving kit and the monies that he lost but I felt that there was no evidence to show that he was in possession of the larger sums in the bag itself. He never had possession of it over the period of time testified to here.

THE COURT: No, I think there is sufficient-- my recollection is the money was counted in front of him. He said that is my money. I don't know if he said it that way.

MR. DUNCAN: But it was never in his possession that day, so I will take an exception.

MR. CULLUM: Do you have any objections?

MR. CULLUM: No, Your Honor.

THE COURT: Alright, bring the jury back.

(At 12:05 P.M. o'clock the jury was returned to the courtroom).

THE COURT: Ladies and gentlemen, I just want to call your attention that when I talked about possession of the money, the evidence with regard to that particular point, I want you to keep in mind that what we have are the

statements that were testified to by the store employees and by the policemen in the presence of this defendant as to the time when he came back and made claim to the money. So there is really no evidence of direct contact of his possession of the money when he came back to claim it. Therefore, you should weigh the evidence in that regard that we have, the evidence per se, and it is competent evidence, admissions and statements as to whether or not this money was in his possession, is something for you to consider and infer from the evidence we have per se.

I am going to charge the request to charge made to me in writing by the attorneys, and these requests that I am giving out of the ones that they submitted are to be considered by you just the same as if I had included them in my main charge that I prepared myself.

I charge you that before the jury may consider the rifle before them for probative purposes, that means in considering it as to whether it links this bank crime, you must find beyond a reasonable doubt that this rifle in evidence was the same one used in the bank

robbery.

I charge you that in regard to Count III, this is the one involving intimidation by use of a dangerous weapon, that in order to convict this defendant, the jury must find that the accused was involved at the bank when he took the sum of $2750.00 from Jean Stalpinski, that he did assault said Jean Stalpinski and put in jeopardy her life by means and use of a dangerous weapon, to wit, a gun. That really follows the wording of Count III of the indictment.

I charge you that in order to convict the defendant on Count III, you must find that the gun was in the possession of the defendant at the time of the robbery or that a gun was in his possession, and that a dangerous weapon was involved in the hold up.

Now I charge you---these are requests by the Government--an assault can be committed without actually touching, striking or doing bodily harm to the person of another. It is not necessary to show that the teller in the bank was physically touched by the robber or anything he was carrying. I charge you that

if you find that the defendant entered the bank and pointed the gun at the teller, there has been a sufficient showing that the teller's life has been placed in jeopardy, and that it is not necessary to prove by direct evidence that the gun was loaded.

Therefore it is not necessary for the Government to show that a weapon is loaded to direct a finding that the teller's life was placed in jeopardy.

I charge you the indictment makes reference to an approximate amount of money that was taken in the robbery. It says $2750.00. It is not necessary for the government to establish that precise amount. It is only necessary to establish that a substantial portion, and it may be more or less than that charged in the indictment, was taken.

Request Number 4, I charge. You may conclude from the evidence, and I talked about this in my own charge, that the weapon in evidence here came from this car and that it belonged to him. While you are not to consider this evidence to show that the defendant was the sort of a person who carried a gun was

more likely than most to have committed an armed robbery, you may consider it as it relates to his opportunity to commit a crime. That is the weapon is relevant to show that the defendant owned or had access to an article with which a crime was or could have been committed. I charge you that in allowing the weapon in evidence, you may consider the testimony, in fact you should consider the testimony of all the witnesses, including Mrs. Stalpinski, the teller who was allegedly robbed. Her testimony concerned what appeared to be a small portion of the muzzle or barrel of a gun sticking out from under some wrappings which contained an opening through which a bullet may come out, and there was some testimony about the size of that opening in reference to the size of a chisel. That is along the same line as I recall the testimony, but I do tell you that your recollection is what governs.

You can also consider testimony of another fellow who testified concerning the back part of the weapon, and I am sure you recall that being taken out of the automobile. The testimony of both tellers is before you and it is up

to you as to how much weight to give to the recovery of the gun to the defendant and his opportunity to commit the crime charged. The importance to be placed on these factors is just one consideration that is left to you.

So I tell you ladies and gentlemen, we are concentrated now on some of these requests I read. This is one factor. It is circumstantial. You have to review it and it is your responsibility to do so with all the evidence in regard to the guilt or innocence of this defendant on each of the three counts.

So I do want to thank you for your attention you have given. I have taken some time, but I assure you that it was necessary.

I believe the Marshal will make some arrangement for you to have lunch in your jury room, so you can commence your deliberations.

At this time Mr. Valyou, I must excuse you because you cannot be with the jurors in their deliberations. I apologize that I won't be able to buy you your lunch but that is the way the situations work out. I do thank you for the time you spent with us. I think you should wait for ten or fifteen minutes and we

tell you the exact date that we intend or hope to start another trial. We are not too sure yet. You are excused, and I appreciate your presence here.

Swear the Marshals now.

(Robert Money and John Jennings were sworn as Deputy Marshals to guard the jury).

THE COURT: Alright. Thank you ladies and gentlemen. You may now retire to your jury room.

(Whereupon at 12:14 P.M. o'clock the jury retired from the courtroom to their deliberations).

THE COURT: Mr. Duncan and Mr. Cullum, it is our usual procedure to wait for the jury to send out notes, as you know, Mr. Cullum, identifying what exhibits they want. I don't know whether you want to make some other arrangement, to stipulate and agree.

MR. CULLUM: As far as I am concerned the usual procedure is satisfactory.

MR. DUNCAN: That is fine.

THE COURT: You think we should wait for the note to identify what they want?

MR. CULLUM: They don't usually ask for

UNITED STATES COURT OF APPEALS

For the Second Circuit

AFFIDAVIT OF SERVICE

No. 75-1014

UNITED STATES OF AMERICA,

Appellee,

-against-

JOHN J. LYNCH,

Appellant.

STATE OF NEW YORK)
)ss.:
COUNTY OF ALBANY)

James E. Banagan, being duly sworn, deposes and says: That deponent is not a party to the action, is over 18 years of age, and resides at 23 Leto Road, Westmere, New York. That on the 28th day of April, 1975, at the United States Attorney's Office located in the Federal Post Office Building, Broadway, Albany, New York, deponent served three (3) copies of the Brief and Appendix in the above-entitled action upon the United States Attorney by delivering the same to James M. Cullum, Assistant United States Attorney, personally.

James E. Banagan
JAMES E. BANAGAN

Subscribed and sworn to before me, this 28th day of April, 1975.

Helen T. Connolly
HELEN T. CONNOLLY
Notary Public State of New York
Residing in Rensselaer County
Commission Expires March 30, 1976.